

The Ten Commandments of Ethical Government Purchasing

"When a man assumes a public trust, he should consider himself as public property."

Thomas Jefferson (1743-1826), quoted from, Life of Jefferson (Rayner), p. 356.

By Suzanne M. Dallimore, Esq.

We are bombarded these days by news stories, radio rants, and talking heads decrying corruption in government: no-bid contracts, insider deals, and allegations of kickbacks large and small. Politicians of every stripe are spinning, posturing, and rushing to photo ops. Some of the charges of corruption are leveled at those who receive the government's largesse, but many indict those within government who grant it.

This gnashing of teeth and wringing of hands is likely to produce "reform" that places additional burdens on government purchasers and the purchasing process. Why is reform necessary? Don't we have laws on the books in every jurisdiction down to the tiniest hamlet against throwing contracts to friends and cronies? Of course we do. The answer may be that what's needed is not reform of law, but the restoration of ethics.

Laws are a manifestation of societal values. For example we all agree that rigging bids and taking bribes is wrong. But law does not address the moral questions government purchasers face. How does a government purchaser obey the law, and, when called to task, retain the ability to stand up and say "my conduct was both legal and ethical"? Law and ethics are not necessarily synonymous. A definition of ethics may help in understanding the difference:

- eth-ics: 1 a. A set of principles of right conduct,*
b. A theory or system of moral values, e.g., "An ethic of service is at war with a craving for gain".
2. The study of the general nature of morality and of the specific choices to be made by a person, a moral philosophy.
3. The rules or standards governing the conduct of a person or the members of a profession, e.g., medical ethics.

Ethics as "right conduct" requires action. Deeply held moral beliefs are satisfying and can be good for society, but even a large group of individuals having such beliefs is of no appreciable benefit unless those individuals put their conduct where their values lie. To accomplish this, it is useful to agree to a short list of ethical conduct rules that go beyond legal technicalities. A procurement ethical code might include the following:

1. Be Independent

A government official engaged in purchasing should be independent, from vendors, bidders, prospective bidders, interested parties and, in a perfect world, politicians and political appointees, including their own bosses. As human beings we tend to form emotional obligation bonds with people we like, who are nice to us, who help us, who flatter us and people who give

us things. In procurement, while one can be friendly and helpful, one must resist the temptation to accept benefits, emotional or economic, from any would-be vendor, so as to reduce the desire to reciprocate.

2. Act Only in the Public Interest

A procurement official represents the public interest, as defined by the legislature or Congress, and never the private commercial interest of a seller of goods or services. It is the legal duty of every person representing a commercial enterprise to maximize its profit. A commercial representative who says he is trying to help the public is not doing his duty to his company. This is not to say that it is bad to have a profit-motive, the profit motive drives markets toward developing better mousetraps. And corporations can be very good public citizens. But a purchasing officer must assume, always, that private profit is the only motive of the vendor or interested private party.

3. You Are a Trustee of the Public's Money

A government purchaser is a fiduciary for the public's money, a trustee. An effective regulatory scheme governing procurement officers might read as follows:

- A. It's not your money.
- B. It's not your money.
- C. It's not your money.
- D. It's not your money.

This catch phrase delineates exactly the ethical limitations of purchasing personnel's discretion. You are not Donald Trump and it is not your money. Spend the public's money with the care you'd demand a bank exercise in handling your own funds.

4. Follow the Law

Most jurisdictions have many statutes and rules that protect competition and consumers in government purchasing. Take all the training in competition and public integrity law available. Develop a close working relationship with enforcement lawyers, so that legal questions can be asked and answered. Your agency's risk management department will be thrilled with your commitment to the law. There are plenty of lawyers who will be used against you, ask that public lawyers be used to help you. This outside check empowers procurement officials since enforcement lawyers can run interference with higher-ups when what they want to do is unlawful, unethical, or against public policy.

5. Strive for Efficiency

This is not easy to do in a system of cumbersome procurement rules. But efficiencies can take hold in ways you can control. Do your homework, independent of any one vendor. Study historic outcomes that reflect poor procurement choices and avoid them. Identify what efficient vendors do and use that as a guide for your next set of specifications. Don't let the vendor write them, write your own so as to produce a similarly efficient outcome. Ignore the "bureaucrats waste money" talk and do your job as efficiently as the system lets you.

6. Protect the Economy

The economy works best when large and small firms are competing to produce the highest quality goods at the best possible prices to meet consumer demand. Buyers drive markets, and government purchasing has a tremendous effect on economies. To protect local economies, consider these guidelines:

A. Do Not Bundle Contracts - Bundled contracts favor big, incumbent firms, to the exclusion of small business. Some regulatory schemes specifically prohibit bundling. Bundling leads to longer contracts, and less flexibility to take advantage of new market products. Some projects require bundling and some statutes allow it, but know that bundling favors old technologies and prevents taking advantage of innovation and the power of head-to-head competition.

B. Run an Arms' Length Shop - Relationships turn into conspiracies where public money is involved, and the official who gets too close to a vendor may be engaged in criminal bid-rigging. Bid-rigging hurts economies and there is no law to the contrary.

C. Research New Ideas - Markets create new technologies and unheard-of small firms come up with wonderful new products and services. Do the market research to ensure that you are not locked into obsolete technology. The economy works better when innovation pays off.

7. Take Nothing, Ever

Don't even accept cookies from the vendor dropping by with the paper delivery. Why not? Surely no one is bought for cookies! If you don't take the cookies, no "appearance" of a "relationship" with that vendor arises and you create no witnesses who can testify against you. Even if your rules permit you to accept lunch or anything valued under \$25, do not take anything. Acceptance of anything can create the appearance of conflicted interests.

8. Do Not Socialize with Vendors

Prosecutors prove procurement offenses through testimony putting government officials at social events with government vendors. If you have social friends who may be bidders, get completely out of any aspect of the process, then socialize. Otherwise, don't do it. This applies to business associations also. If you want to fraternize, get out of the procurement process entirely before you do.

9. Maintain Confidentiality

The business of the government in buying goods and services is your business, not the business of your business associates, your friends, or your golf buddies. Reveal only that necessary to insure clean bids and a sterling selection process. The possession by a bidder of insider information not available to his competitors is almost universally an issue in procurement crime enforcement. If the information is public, everyone gets it. If it is not, nobody gets it.

10. Do Not Play Favorites

Do not help cronies, family members, business associates, or good buddies get a leg up in the procurement process. Whether you like the representative of a contractor or would-be bidder, whether the firm has the best holiday parties, or whether the vendor will hire your child to help her through college are all irrelevant to the procurement process. It is not irrelevant to criminal prosecutors. Almost every jurisdiction has common, or court-made law that says favoritism in the expenditure of public money is wrong.

Here then is a working model of a proposed Ten Commandments of Ethical Government Purchasing. Since you are, in Jefferson's words, a "public property", your ethics are as important as your formal rules. Remember that, "an ethic of service is at war with a craving for gain". Above all, stay independent and you'll stay above the fray. The payoff? It won't be your name, or your agency's name, in the next "culture of corruption" headline. Ethical procurement isn't always easy, but it's always worth the effort.

Editor's Note: *Suzanne M. Dallimore has 28 years' experience as an antitrust and commercial and securities fraud litigator, prosecutor, and trial attorney in Utah and Arizona. She served as Chief Antitrust Counsel for the Arizona Attorney General and as Chief Counsel, Utah Attorney General's Antitrust Division. Ms. Dallimore is currently in private practice. Notable cases include: State v. Thompson and State v. Fletcher (criminal RICO, bid-rigging and commercial bribery criminal convictions); In re: Project SLIM Investigation, (Arizona state government contract bid-rigging, \$750,000 recovered for Arizona); In re: Electric Utility Deregulation Proceedings, Arizona Corporation Commission, (utility stranded costs proceedings, \$800 million saved for Arizona electric consumers); Baseplans USA v. Arizona Department of Transportation, et al, (Public corruption and bid-rigging, case pending). Contact Ms. Dallimore via e-mail: sdallimore@aol.com or phone: 602-748-1800.*